

Denials of consular access to Americans abroad: current cases

"Protection of American citizens is . . . our first duty as the State Department. Our consular duty is our first and foremost duty."

Gordon Duguid, Acting Deputy Department Spokesman
State Department Daily Press Briefing, March 2, 2009

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Cuba: Alan Gross

Alan P. Gross was arrested on December 5, 2009 for distributing cell phones, laptops and communications equipment in Cuba, reportedly as part of a USAID program to support nonprofit religious organizations. The State Department reported on December 14 that it had received immediate notification of the arrest but was still waiting for consular access to be granted. A spokesperson announced that "we would expect the Government of Cuba to honor its obligations under the Vienna Convention" and "grant consular access...in a very expeditious way." Noting that consular access had been requested repeatedly, the spokesperson added that under the VCCR Cuba "is required to give timely access to consular officers to visit the individual and ensure...that they are being treated humanely and in accordance with local law."¹ On December 28, Mr. Gross was visited by a consular representative; in Washington, a State Department spokesman said that the administration remains "focused on the welfare of the detained U.S. citizen."² He was sentenced to 15 years imprisonment in March of 2011.³ The day before the sentence was announced, Secretary of State Clinton noted that that Mr. Gross had been "unjustly jailed for far too long" and that his need "to be able to leave Cuba and return home is a matter of great concern to the U.S. government."⁴

U.S. hikers detained in Iran

After crossing an unmarked border into Iran while on a hiking vacation in northern Iraq, U.S. citizens Shane Bauer, Sarah Shourd and Josh Fattal were detained by Iranian security forces on July 31, 2009. On August 10, the State Department reminded Iran "of its responsibilities under the Vienna Convention on Consular Relations, which is to provide consular access to people that have been detained in what we would call without delay." The next day, a State Department spokesperson declared that "Iran has obligations under the Vienna Convention, and we demand consular access at the first opportunity." On August 15, the Secretary of State called on the Iranian government "to live up to its obligations under the Vienna Convention and by granting consular access and releasing these three young Americans without further delay" and reiterated that "[o]ur goal is to ensure the safe return of all our missing or unjustly detained American citizens to the United States as quickly as possible so that they can be reunited with their families."⁵ Citing the VCCR, a concurrent resolution was introduced in Congress on September 22 that called on the Iranian government to permit consular access and encouraged the release of the three detainees "at the soonest possible opportunity."⁶

¹ U.S. Department of State, Daily Press Briefing (Dec. 14, 2009).

² Paul Haven, *Cuba gives US diplomat access to arrested American*, Associated Press, Dec. 29, 2009, at http://www.usatoday.com/news/world/2009-12-29-Cuba_N.htm

³ CNN, *U.S. contractor sentenced to 15 years in Cuban prison, at* http://articles.cnn.com/2011-03-12/world/cuba.alan.gross_1_villa-marista-cuban-government-alan-gross?_s=PM:WORLD

⁴ *Id.*

⁵ U.S. Secretary of State, *Missing and Detained Americans in Iran*, Aug. 15, 2009, at <http://www.state.gov/secretary/rm/2009a/08/127948.htm>

⁶ H. CON. RES. 189 (111th CONGRESS, 1st Session).

Dear [Letter to Speaker and House Minority Leader & House and Senate Leaders Reid and McConnell with copies to the bipartisan leadership of the House and Senate Judiciary Committees and House and Senate Foreign Relations Committees]:

Every day, U.S. citizens working, visiting, and living abroad have come to rely on the assistance of our embassies and consulates overseas. One right enjoyed by all Americans abroad is the right of access to one's consulate if arrested or detained by the host country. Article 36 of the Vienna Convention on Consular Relations (VCCR) grants individual foreign nationals a right of access to their consulate, and ensures that consulates can visit their nationals and help arrange legal representation. These services help ensure our citizens receive fair treatment when detained abroad. We applaud our dedicated embassy staff for vigorously defending these rights and assisting U.S. citizens who are arrested or detained abroad. The business community strongly supports Article 36 of the VCCR and believes that the United States, in order to ensure reciprocity for U.S. citizens, should lead the world in compliance. It is for this reason that we urge the U.S. Congress to enact legislation giving effect to the *Case Concerning Avena and Other Mexican Nationals*, 2004, I.C.J. 128.

In 2004, the International Court of Justice (ICJ) determined that the United States had violated Article 36(1)(b) of the VCCR by failing to inform 51 Mexican nationals of their VCCR rights, and by failing to notify consular authorities of the detention of 49 Mexican nationals. The United States voluntarily consented to the ICJ's jurisdiction to hear such complaints when it ratified in 1969 an Optional Protocol Concerning the Compulsory Settlement of Disputes.

President Bush, recognizing that the rule of law required the United States to comply with the ICJ's decision and to continue to preserve these rights for American citizens, issued a determination on February 28, 2005, that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision in accordance with general principles of comity." The Supreme Court, however, in *Medellín v. Texas*, 552 U.S. 491 (2008), held that the Optional Protocol is not a self-executing treaty and that the president did not have the authority unilaterally to enforce the decision of the ICJ. The Court held that only Congress can transform a non-self executing treaty into binding federal law.

Justice Roberts, writing for the Court, noted that "[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna convention disputes—constitutes an *international* law obligation on the part of the United States." Nevertheless, the Court held that the *Avena* judgment did not have automatic domestic legal effect and that, to give it effect, congressional action is required.

U. S. Urges the Iranians To Obey Court Decision

Special to The New York Times

WASHINGTON, May 24 — The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions.

A formal statement said the United States was "deeply gratified" by the decision.

"The Court's judgment confirms that such conduct is inadmissible in a civilized international order and cannot be excused or justified by past grievances, whether real or imagined," the statement said.

State Department officials indicated privately, however, that they had little reason to expect compliance in light of Teheran's rejection of the Court's jurisdiction.

The United Nations Charter says that each member "undertakes to comply with the decisions" of the Court in any case to which it is a party and says that if it fails to do so, the other party "may have recourse to the Security Council."

In practice, nations have been bound by decisions of the Court only when they agreed in advance to carry out the verdict. The United States reserves the right to decide when the World Court has jurisdiction in a case involving the United States.

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The New York Times

Published: May 25, 1980

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